Supreme Court, U. S.
FILED
APR 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-5187

PHILLIP JEROME LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

CONRAD KELLENBERG
JOSEPH P. BAUER
Notre Dame Law School
Notre Dame, Indiana 46556

Court Appointed Co-counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

ARGUMENT:

I. THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARS PETITIONER'S RETRIAL 1

A. Barring petitioner's second trial is consistent with the policy objectives of the Double Jeopardy Clause 2

B. Petitioner is not estopped from asserting his rights under the Double Jeopardy Clause 4

II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BARS PETITIONER'S RETRIAL 8

III. CONCLUSION 9

IV. CORRECTION TO PETITIONER'S BRIEF 10

TABLE OF AUTHORITIES

Cases:

Barker v. Wingo, 407 U.S. 514 (1972) 10

Benton v. Maryland, 395 U.S. 784 (1969) 9

Brady v. Maryland, 373 U.S. 83 (1963) 9

Doyle v. Ohio, 426 U.S. 610 (1976) 9

Illinois v. Somerville, 410 U.S. 458 (1973) 2

United States v. Dinitz, 424 U.S. 600 (1976) 2,3

United States v. Martin Linen Supply Co., ____ U.S. ____, 45 U.S.L.W. 4337 (1977) 2

United States v. Wilson, 420 U.S. 332 (1975) 2

Wade v. Hunter, 336 U.S. 684 (1949) 3,7

Page

United States Constitution:

Fifth Amendment 9

Miscellaneous:

Federal Rules of Criminal Procedure:

Rule 7(e) 6
Rule 12(b)(2) 5
Rule 51 5

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-5187

PHILLIP JEROME LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

I.

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARS PETITIONER'S RETRIAL.

The brief for the United States recognizes that the case at bar presents a different factual situation from previous cases in this Court in which retrial was

permitted after a motion for a mistrial, e.g., *United States v. Dinitz*, 424 U.S. 600 (1976); *Illinois v. Somerville*, 410 U.S. 458 (1973). In those cases, the trial court granted the mistrial as soon as the motion therefor was raised. Here, instead, although the motion to dismiss was made at the beginning of the trial, the court heard the entire evidence in the case before dismissing the action. The United States attempts to distinguish those cases on two levels. First, it says that petitioner was not prejudiced by the receipt of evidence before the motion was passed upon. Then, it argues that petitioner's trial counsel was largely responsible for any procedural deficiencies.

A. Barring petitioner's second trial is consistent with the policy objectives of the Double Jeopardy Clause.

The policy objectives of the Double Jeopardy Clause have already been stated in petitioner's principal brief—preventing prosecutorial abuse from multiple prosecutions;[1] protecting the defendant from the emotional, financial and social injuries caused by repeated exposure to the trauma of trial; safeguarding the defendant's right not to have his defense tactics previewed by the prosecution,[2] and his right to prevent

[1] Recent cases have been "focusing on the prohibition against multiple trials as the controlling constitutional principle." *United States v. Wilson*, 420 U.S. 332, 346 (1975), cited in *United States v. Martin Linen Supply Co.*, ____ U.S. ____, 45 USLW 4337, 4339 (1977).

[2] In fact, prior to the first trial, petitioner had originally indicated that he would call an alibi witness. At the trial, he decided not to call this witness, and instead the defense rested immediately after the conclusion of the prosecution's case. This defense strategy may have been valuable information for the prosecution's preparation for the second trial. (1st Tr. Trans. p. 67, App. p. 13).

the prosecution from having a dress rehearsal of the trial, complete with witnesses and defendant; and advancing basic notions of procedural fairness. The Government argues that the only additional interest of the defendant which the Double Jeopardy Clause might protect, in the situation at bar, as contrasted to the concededly allowed retrial following a defendant's successful appeal of his conviction, is the "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). The Government further argues that petitioner did not lose even this, since the trial court indicated its belief in petitioner's guilt. Petitioner has already suggested that this comment was a gratuitous *obiter dictum*, (Pet. Br. p. 18, n. 27). However, the respondent's argument overlooks the two parallel rights which were lost by the petitioner.

In addition to the right to have a verdict, another important objective of a defendant is to retain some measure of control over his trial.[3] The defendant does not want to sit through the anxiety of trial if he knows that it is procedurally so defective that it might as well be terminated immediately, in order to begin a proper, new trial. (Pet. Br. pp. 23-24).[4] Here, not only did

[3] "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error [requiring a motion for a mistrial]." *United States v. Dinitz*, 424 U.S. 600, 609 (1976).

[4] The brief for the United States recognizes this interest: "There is no point in requiring a defendant to endure the remainder of a trial that already (in his opinion) is so infected with error that a reversal and a second trial are bound to follow." (Res. Br. p. 14).

petitioner not have control over the stage at which his trial was terminated, but after sitting through the trial to the bitter end, notwithstanding an objection at the very beginning of the trial, he was then denied the benefit of an ultimate determination—the verdict was never pronounced.

B. Petitioner is not estopped from asserting his rights under the Double Jeopardy Clause.

The brief for the United States points to certain omissions by defense counsel at the first trial, which it is asserted should estop petitioner from contesting the unfairness of subjecting him to repetitive trials.

First, the Government suggests that defense counsel sought a tactical advantage by raising the deficiency in the information only on the day of trial, rather than by pre-trial motion. One can only speculate about trial counsel's motives. However, as respondent points out in its brief (Res. Br. p. 2), Mr. Swanson was petitioner's second appointed counsel, appointed seven weeks before the commencement of the trial. The original appointed counsel withdrew when he became associated in law practice with a U.S. Magistrate. Thus, it may be that the new counsel, receiving the case on the rebound, focused primarily on investigation and interviewing witnesses. He may simply not have had time, notice or compelling reason to examine the information in detail until the eve of trial. It may be that instead of seeking to hide the defense, to raise it only at trial, Mr. Swanson only noticed the defect shortly before the case was scheduled for trial. This Court certainly can take judicial notice of the heavy burden of many counsel

appointed in *in forma pauperis* cases, and of the simple reality that such counsel may be unable to devote the same attention to these cases as defense counsel to wealthier clients usually render. It bears emphasis that Mr. Swanson did raise the deficiency in the information at the very beginning of trial, before any evidence had been introduced. It would be far stronger evidence of a trial tactic if he had pointed out the deficiency only after the Government had put in its case and defense counsel had made the evaluation that the evidence was unfavorable to his client.[5]

Second, the Government argues that after the trial court declined to rule on the motion directed to the sufficiency of the information, the petitioner should have objected to continuing with the trial. We have already pointed out (Pet. Br. p. 23) that requiring the defendant to press such objections is utterly unrealistic, especially in a bench trial. It would hardly be good strategy to argue with the judge who has just made the ruling, when that same individual not only will control the entire flow of the case, but will also be the trier of fact.[6]

[5] Respondent does not challenge the timeliness of the motion objecting to the sufficiency of the information. Federal Rule of Criminal Procedure 12(b)(2) provides that "failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

[6] The Federal Rules of Criminal Procedure have expressly eliminated the requirement that a party make an exception to an adverse ruling of the court: "Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor. . . ." Fed. R. Crim. P. 51.

Furthermore, an objection to the sufficiency of the information would seem to carry with it the implicit request that, if the court is unsure about the motion, it will grant a continuance to determine the information's sufficiency.

Instead of demanding that defense counsel have sole responsibility for objecting, it seems more appropriate to ask why the U.S. Attorney did not request a recess or move to amend the information[7] or why the judge did not order the recess *sua sponte*. The prosecution was obviously responsible for drafting the faulty information; therefore, it does not seem unfair to require it to bear the responsibility of requesting an opportunity to check its sufficiency, once the very defect is pointed out by the defendant. Since the record demonstrates that the deficiency was noticeable simply by comparing the information with the applicable statute, putting such a duty on the prosecution or the court could hardly be characterized as onerous.[8]

[7]If the prosecution had been so sure that the evidence after trial would point to guilt, it is curious that prior to the judge's ruling, the U.S. Attorney never availed himself of the opportunity given by Fed. R. Crim. P. 7(e), of moving to amend the information to cure the defect. The failure of the U.S. Attorney to make this motion may indicate that he preferred a second trial, at which time he would attempt to bolster his case. The argument of the United States (Res. Br. p. 34, n. 22) is once again an illustration of respondent's belief that the responsibility of securing an error-free trial falls principally on the defendant.

[8]The Government asserts that "the trial court in petitioner's first trial could not have known whether lengthy study would be needed here..." to determine if the information was defective. (Res. Br. p. 32). We have already noted the fact that the judge stated, when he ruled on the motion, that "[t]he briefest examination of the statute establishes [the defect]..." (Pet. Br. p. 21, n. 33). We have also noted that hindsight shows that the research took no more than a few minutes. But, even without the benefit of hindsight, it is fair to point out, as Judge Eschbach himself implied, that a first year criminal law course teaches that intent is always an element of theft. "[I]f a law clerk of mine out of law school drafted something like that, I would send him back for a refresher course." (1st Tr. Trans. p. 68, App. p. 14). Thus, unlike an arcane rule of law, here the objection was fundamental enough that even an objection on the day of trial should have been more than sufficient.

The United States asserts that "[t]he argument that an objection or request for a continuance would have been futile is nothing but speculation." (Res. Br. p. 33). The United States also asserts that "it would have been poor judicial administration for the judge to have stopped the trial in its tracks" to research petitioner's motion (Res. Br. p. 31). Respondent can not have it both ways. If such a delay would have been unwise, then a motion by the petitioner would indeed have been futile, for it would have been expected that the trial judge would not grant that motion. If, on the other hand, the motion would have been granted, then it would have been equally appropriate for the judge to have granted the recess *sua sponte*, or for the prosecution to have made a request therefor.

Finally, the United States argues that the petitioner should have preserved the "valued right to have his trial completed by a particular tribunal," (*Wade v. Hunter*, 336 U.S. 684, 689 (1949)), by insisting that the trial court first render a verdict before ruling on the objection to the information. An examination of the trial record, however, will show that under the circumstances, requiring petitioner to make such a request would have been unreasonable. At the conclusion of the prosecution's evidence, defense counsel made a motion to dismiss the action for failure of evidence. The court denied the motion, while noting that this ruling did not apply to defendant's motion going to the sufficiency of the charge. After the defense rested without presenting evidence, the court then made its *obiter dictum* regarding petitioner's guilt. Immediately thereafter, it dismissed the action pursuant to the reserved motion. Petitioner's motion directed to the sufficiency of the information was not expres ly

renewed. Defense counsel had inadequate warning that he should affirmatively ask for a verdict, since at that point it was unclear that the verdict was not forthcoming and that the court was about to rule directly on the reserved motion.

II.

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BARS PETITIONER'S RETRIAL.

Subjecting petitioner to a second trial, after an erroneous first trial, also violated petitioner's rights under the Due Process Clause of the Fifth Amendment. The United States argues (Res. Br. p. 36, n. 24) that the Due Process Clause "adds nothing to the double jeopardy arguments [because] [m]ultiple trials are held routinely in civil litigation . . . and it has never been thought that multiple trials are themselves offensive to anything in the Due Process Clause."[9]

The case at bar, however, involves more than a mere repetitive trial. The proceedings as a whole were grossly unfair towards the petitioner. Instead of safeguarding his rights, the prosecutor and trial judge subjected him to a needless, and useless, first trial, although a simple comparison of the information and the applicable statute would have shown that the conviction could never be sustained and that therefore further proceedings were futile.

[9] Interestingly, the United States concedes that there is such a difference in its brief in this Court in *Jeffers v. United States*, No. 75-1805: "[S]uccessive prosecutions that pass muster under the Double Jeopardy Clause might in some circumstances be so unfair as to violate due process. . . ." (At p. 14).

Although the limits of the Due Process Clause are sometimes difficult to determine, it is clear that its standards are violated when the process is unfair.

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).[10]

The cumulative errors in the first trial were such that, when the trial was terminated after all the evidence was taken but without any verdict being rendered, subjecting petitioner to a second trial violated his rights under the Due Process Clause.

III.

CONCLUSION

The basic defect in the respondent's position is that the United States would cast the principal burden for safeguarding the defendant's Constitutional rights on the defendant himself. The United States gives little consideration to the alternatives that were available both to the prosecution and to the judge, to insure that there would be a single fair trial. Because all parties failed in some measure to perform up to excellence, the United States would estop the petitioner from asserting the protections guaranteed him by the Fifth Amendment. We respectfully suggest that our system of justice creates a different balance. If the prosecution and the

[10] For an analysis of the Due Process Clause in a setting implicating double jeopardy considerations, see Mr. Justice Harlan's dissent in *Benton v. Maryland*, 395 U.S. 784, 809-813 (1969). Compare *Doyle v. Ohio*, 426 U.S. 610 (1976).

court act deficiently—as here, both in initiating the trial and in carrying it out—it is simply not enough to say that it is the defendant who ought to have done more to rescue them from their shortcomings, or who must pay the price. This Court has set a higher standard:

> A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. *Barker v. Wingo*, 407 U.S. 514, 527 (1972).

IV.

CORRECTION TO PETITIONER'S BRIEF

The Statement of the Case and the Summary of Argument in Petitioner's Brief may be read to suggest that petitioner's objection to the sufficiency of the information was made prior to the day of trial. To correct any possible misimpression, the second sentence in the second paragraph on page 3 should read: "On July 16, 1974, prior to the commencement of the evidentiary portion of the trial, ..." Similarly on page 4, the Summary of Argument should begin: "Prior to the commencement of the evidentiary portion of petitioner's first trial, ..."

Respectfully submitted,

CONRAD KELLENBERG
JOSEPH P. BAUER
Notre Dame Law School
Notre Dame, Indiana 46556

Court Appointed Co-counsel for Petitioner